Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DOMINO'S PIZZA, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
and DAVID PAPA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should clarify the standard for imposing liability on employers for sexual harassment by supervisory employees, where there is substantial conflict among the circuits about the correct standard to apply in light of *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 63 (1986).

2. Whether Title VII permits a district court to order sweeping injunctive relief against an employer where the court found that a single employee at one location had been subjected to harassment by a single low-level supervisory employee roughly seven years earlier.

PARTIES TO THE PROCEEDING

Neither Domino's Pizza, Inc. nor any of its affiliated companies are publicly traded. Domino's Pizza, Inc. is wholly owned by TISM, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Domino's Pizza, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A) is unreported. The opinion of the District Court (App. B) is reported at 909 F. Supp. 1529 (M.D. Fla. 1995).

JURISDICTION

The Court of Appeals for the Eleventh Circuit summarily affirmed the judgment of the District Court on April 17, 1997. The Eleventh Circuit denied a timely Suggestion of Rehearing En Banc on July 3, 1997. (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. § 2000e-2(a)(1) (1988)[1] provides in relevant part:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-3(a) (1988) provides in relevant part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this subchapter.

42 U.S.C. § 2000e-5(g) (1988) provides in relevant part:

> (g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders
>
> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back

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[1] The District Court applied the pre-1991 version of Title VII in this case, because the pertinent events occurred in 1988. App. B at 13a, n.3. The 1991 Amendments, however, did not affect the substance of the Title VII provisions in question here.

> pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.
> . . .

STATEMENT OF THE CASE

The fundamental question presented by this Petition is one that has been presented to courts with increasing frequency in recent years, and has resulted in confusion and conflict in the case law: What is the proper standard for evaluating employer liability for sexual harassment by a supervisory employee? A related issue concerns the propriety of imposing broad, sweeping injunctive relief against a company based on a finding that a single employee at one of the company's hundreds of locations nationwide had been subjected to sexual harassment by a low-level supervisor approximately seven years earlier.

1. Factual Background.

This case involves allegations that David Papa, while employed by Petitioner Domino's Pizza, Inc. ("Domino's"), was sexually harassed and retaliated against by his immediate supervisor, Beth Carrier. At the time the events in question occurred, Papa worked as store manager at Domino's Port Richey, Florida location, and Carrier was a Corporate Area Supervisor. App. B at 4a.

According to the findings of the District Court, between January and May of 1988, Carrier engaged in various instances of inappropriate conduct towards Papa. These incidents included touching Papa, making several comments with sexual connotations, including comments about Papa's body, and expressing caring and affection for Papa. *See id.* at 4a-5a. On one occasion, during a conversation about where Papa and his young son, David, would live, Carrier expressed her caring for Papa, and offered to let Papa and his son come live with her. Papa responded by ordering Carrier to leave his office and threatening to report Carrier's conduct to her supervisor.

The District Court found that, when Carrier left the store, she made a comment to the effect that she would "get" Papa. *Id.* at 5a.

Approximately a week after Papa's last encounter with Carrier, she and her supervisor, Mike Haskins, came to the store and informed Papa that he was being fired for violating company policy, including manipulating company paperwork. *Id.* at 5a-6a. The District Court credited testimony to the effect that Carrier had been involved in or had approved the manipulation of paperwork, and that Papa did not know these actions violated company policy. *Id.* at 6a.

Papa never reported his claims of sexual harassment to Carrier's supervisors. *Id.* Indeed, the District Court expressly found that Domino's had neither actual nor constructive knowledge of Carrier's alleged activities. *Id.* at 10a.

2. The Proceedings Below.

The Equal Employment Opportunity Commission (EEOC) filed suit on August 12, 1991, alleging that Domino's violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, when Carrier subjected Papa to sexual harassment. The EEOC also alleged that Papa's subsequent termination was retaliatory. On October 17, 1991, Papa was granted leave to intervene in the case.

Following a bench trial in November 1994, the District Court entered judgment in favor of the EEOC and Papa, finding Domino's liable for hostile environment harassment, quid pro quo harassment and retaliation. The Court held that Domino's was not "indirectly" liable for Carrier's harassment via respondeat superior because, in order to establish such liability, the plaintiff would have to show that the employer knew or should have known of the harassment, and failed to take remedial action. *Id.*

at 9a-10a. Because Papa never made a report of harassment to anyone at Domino's, and no one from management was present to observe Carrier's conduct, Domino's had neither actual nor constructive knowledge of the hostile environment created by Carrier. *Id.* at 10a. The Court concluded that Domino's was nevertheless "directly" liable for Carrier's conduct on the ground that, "where the harasser is the employer or an agent of the employer, the employer is directly liable." *Id.* The Court noted that the Eleventh Circuit had previously adopted the EEOC's view that a supervisor acts as an "agent" of the employer when the supervisor uses the authority delegated to him to make or threaten to make decisions affecting the employment status of his subordinates. Domino's was therefore directly liable because, when Carrier fired Papa, she was exercising the authority delegated to her by Domino's. *Id.*

With regard to the allegation of quid pro quo harassment, the Court noted that acceptance or rejection of harassment by an employee must be an express or implied condition for receiving a job benefit or must be the cause of a tangible job detriment in order to create liability under this theory. *Id.* at 11a. The Court then relied on the same facts—Papa's negative reaction when Carrier expressed her caring and offered to let Papa and his son come live with her, coupled with his subsequent termination—as a basis for finding quid pro quo harassment. *Id.* The Court also relied on these facts to find retaliation. *Id.* at 12a. The District Court awarded Papa $237,257.52 as well as attorneys' fees.[2] *Id.* at 16a; App. D. In addition, the Court permanently enjoined Domino's "from engaging in any employment practice which discriminates against employees by subjecting them to sexual harassment and or [sic] which discriminates

[2] Papa ultimately recovered $34,641.49 as a separate attorneys' fees award. If the present Petition is granted and the judgment is vacated, Domino's requests that the award of attorneys' fees also be vacated.

against employees who oppose what the employee believes to be a discriminatory employment decision." *Id.* at 16a-17a. The Court also directed Domino's "to post a written sexual harassment and retaliation policy in each of its stores for a period of at least two years from the date of this judgment." *Id.* at 17a. Domino's was further directed "to conduct yearly training of each of its managers, including store managers, regarding [Domino's] sexual harassment and retaliation policy for a period of two years from the date of this judgment." *Id.*

Domino's filed a timely appeal and, on April 17, 1997, the Eleventh Circuit summarily affirmed the District Court's judgment. App. A. Domino's then filed its timely Suggestion of Rehearing En Banc, which the Eleventh Circuit denied on July 3, 1997. App. C.

REASONS FOR GRANTING THE PETITION

I. THE PETITION SHOULD BE GRANTED TO RESOLVE EXISTING CONFLICT AND CONFUSION AMONG THE CIRCUITS ABOUT THE CORRECT STANDARD TO APPLY IN DETERMINING WHEN AN EMPLOYER SHOULD BE HELD LIABLE FOR SEXUAL HARASSMENT BY A SUPERVISOR.

This case presents difficult and important questions about the law governing an employer's liability for sexual harassment by supervisory employees. Since this Court's decision in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 63 (1986), courts have struggled to forge proper standards for evaluating employer liability, and in the process, have reached confusing and conflicting results. In some instances, including the present case, courts have applied standards that essentially conflate the theories of quid pro quo harassment and hostile work environment harassment, and blur the distinction between these types of harassment and retaliation claims. This Court should grant Domino's Petition for a Writ of Certiorari to resolve the conflict among the circuits and bring order to the chaotic case law on this important and frequently litigated issue.

In *Meritor*, this Court declined to announce any definitive rule on employer liability, stating only that courts should look to agency principles for guidance. 477 U.S. at 72. Beyond that general instruction, the Court pointed out that, when Congress defined "employer" in Title VII to include any "agent" of an employer, it was surely evincing an intent to place some limits on the acts of employees for which employers are to be held liable. *Id.* Citing generally to the RESTATEMENT (SECOND) OF AGENCY §§ 219-237 (1958) ("the RESTATEMENT"), the Court held that it was error to conclude either that employers are automatically liable for sexual harassment by their supervisors or that an employer will necessarily be insulated by lack of notice of the harassment. *Meritor*, 477 U.S. at 72. There was no ruling or suggestion that Title VII incorporates the RESTATEMENT; in fact, the Court cautioned that "common-law [agency] principles may not be transferable in all their particulars to Title VII." *Id.*

In the decade following *Meritor*, courts have largely failed to heed this warning. Instead, they have attempted simply to apply traditional agency principles as set forth in the RESTATEMENT—a text drafted some forty years ago with very different kinds of problems in mind—as a framework for evaluating liability in the harassment context. The result has often been awkward and opaque formulations of liability rules, as well as confusion and conflict in the case law. As Chief Judge Posner of the Seventh Circuit recently stated,

> by citing the Restatement, [the Supreme Court] gave lawyers and judges a straw to grasp at. The straw has broken in their hand. The Restatement turns out to be hopelessly vague in its bearing on the issue of employer liability for sexual harassment, being vaguely worded and addressed to other issues. So judges can in good faith reach opposite results when they seek guidance in the Restatement to employers' liability for sexual harassment by supervisory employees. *See, e.g., Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997) (en banc).

Jansen v. Packaging Corporation of America; Ellerth v. Burlington Industries, —— F.3d ——, Nos. 95-3128, 96-1361, slip op. at 19 (7th Cir. August 12, 1997) (en banc) (Posner, C.J., concurring and dissenting).[3]

Faragher, cited by Chief Judge Posner as an example of the confusion that exists despite the good faith efforts of judges, is an en banc decision of the Eleventh Circuit addressing circumstances in which an employer may be held liable for supervisor-created sexual harassment. It was handed down at virtually the same time as the panel decision summarily affirming the District Court in the present case. Yet the District Court's analysis, effectively adopted by the panel's summary affirmance, is inconsistent with *Faragher*. The District Court's opinion is also an excellent example of the analytical distortion that can result when courts simply engraft traditional agency principles onto Title VII/harassment law, and broadly apply them.

As noted above, in analyzing the issue of Domino's liability for the hostile environment harassment of store manager David Papa by a low-level supervisor, Beth Carrier, the District Court noted that an employer may be held "indirectly" liable via respondeat superior if the plaintiff can establish that the employer knew or should have known of the harassment, and failed to take remedial action. Because Domino's had neither actual nor constructive knowledge of the atmosphere created by Carrier, the Court concluded that Domino's could not be held "indirectly" liable. App. B at 9a-10a.

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[3] The Seventh Circuit's recent decision in *Jansen* is an excellent illustration of the confusion and dissension that exist on the issue of employer liability, not only between circuits but within circuits. The en banc Court was unable to forge a majority position regarding the proper standard for evaluating an employer's liability for sexual harassment by a supervisor. Eight judges wrote separately to express their views on various aspects of the issues presented.

Alternatively, the District Court stated, where the harasser is the employer or an agent of the employer, the employer is "directly" liable. App. B at 10a. The District Court noted that the Eleventh Circuit had adopted the EEOC's view that a " 'supervisor acts as an "agent" of the employer . . . where [the] supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates.' " *Id.* (quoting *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1558-59 (11th Cir. 1989)).[4] In an overly expansive and attenuated application of this principle, the District Court concluded that Domino's was therefore "directly" liable for Carrier's hostile environment harassment, because Carrier was exercising the authority delegated to her as an agent of Domino's when she was involved in the subsequent firing of Papa. App. B at 10a.

In *Faragher*, the Eleventh Circuit reformulated its standard for liability for claims of hostile environment sexual harassment. The en banc Court explained that an employer is *directly* liable for hostile environment sexual harassment if it knew or should have known of the harassment and failed to take immediate and appropriate remedial action. Under this theory, the employer "can be held liable for its own negligence or recklessness, but not for the conduct of it supervisors or employees." *Faragher*, 111 F.3d at 1535. In contrast, employers may generally be held *indirectly* liable for hostile environment harassment by a supervisor under two agency principles: (1) where the harasser is acting within the scope of his or her employment in perpetrating the harassment; and (2) where the harasser is acting outside the scope of his or her employment, "but is aided in accomplishing the harassment by the existence of the agency relationship."

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[4] The language in *Sparks* on which the District Court relied is a quote from *Meritor*, in which this Court stated, without ruling upon, one portion of the EEOC's position on liability issues as set forth in its amicus brief. *Meritor*, 477 U.S. at 70-72.

Id. at 1536 (citing RESTATEMENT (SECOND) OF AGENCY § 219(1) and (2)).[5]

Addressing the first agency principle, the Eleventh Circuit stated that harassing conduct is typically outside the scope of the supervisor's employment, because the supervisor generally does not intend to perform any service for his employer, but acts from purely personal motives to further some personal end. *Id.* at 1535-36. As for the second agency principle, the Court observed that, in a sense, a supervisor is always aided in accomplishing hostile environment harassment by virtue of his agency relationship with the employer because of his role and responsibilities as a supervisor. The Court cautioned, however, that the term "aided" should not be used in such a broad sense. "Rather, the employer is liable only if the harassment is accomplished by an instrumentality of the agency or through conduct associated with agency status," as, for example, where the harasser repeatedly reminds the victim he can fire her if she refuses his advances. *Id.* at 1537.

The Eleventh Circuit's evolving formulation of a liability standard raises several significant issues. First, it conflicts with the standards applied in other circuits. Second, it obscures any meaningful distinction between

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[5] The RESTATEMENT (SECOND) OF AGENCY § 219 provides:

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment;

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) The master intended the conduct or the consequences, or

(b) The master was negligent or reckless, or

(c) The conduct violated a non-delegable duty of the master, or

(d) The servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

hostile environment harassment and quid pro quo harassment. And third, it illustrates how the broad and conclusory application of generic agency principles—which were certainly *not* drafted with sexual harassment in mind —can result in an inappropriate and dangerously expansive analysis of harassment claims.

A. Conflicting Standards for Imposing Liability.

The Eleventh Circuit's formulation in *Faragher* of a standard for imposing liability for hostile environment harassment by a supervisor is not only vague and confusing, it is inconsistent with standards applied in other circuits. As the Second Circuit recently understated, "[r]elying on the imperfect analogy to agency law, and specifically on the Restatement of Agency, courts have had difficulty establishing coherent rules in this area." *Torres v. Pisano*, 116 F.3d 625, 633 (2d Cir. 1997).

For example, in contrast with the Eleventh Circuit's more complex formulation, several circuits apply a straightforward negligence standard. *See, e.g., Davis v. City of Sioux City*, 115 F.3d 1365, 1368 (8th Cir. 1997) (in cases alleging hostile environment sexual harassment by a supervisor, the employer is liable only if it knew or should have known of the hostile environment); *Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 261 (4th Cir. 1996) (an employer is liable for a sexually hostile work environment created by a supervisor or other employee only if the employer knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action); *Nichols v. Frank*, 42 F.3d 503, 508 (9th Cir. 1994) (the proper analysis for employer liability in hostile environment cases is what management-level employees knew or should have known, not whether an employee was acting within the scope of his employment). Indeed, one of the few issues a majority of the Seventh Circuit was able to agree upon in *Jansen* was that negligence is the only proper standard of employer liability in cases of hostile environment sexual

harassment, whether the harasser is a supervisor or a co-worker. *Jansen*, —— F.3d ——, slip op. at 2 (per curiam opinion).

Other circuits include negligence as one basis for liability, but, like the Eleventh Circuit, also incorporate various other agency principles into their liability formulations. Thus, the Tenth Circuit, in *Harrison v. Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), adopted a broad view of § 219 of the RESTATEMENT, holding that an employer can be held liable for hostile environment harassment by one of its supervisors if (1) the supervisor committed the harassment while acting in the scope of his employment; (2) the employer knew or should have known of the harassment and failed to respond appropriately; (3) the employer manifested in the supervisor the authority to act on its behalf, and such manifestation resulted in harm to the plaintiff, who acted or relied on the apparent authority; or (4) the employer delegated to the supervisor the authority to control plaintiff's work environment and the supervisor abused that delegated authority by using it to aid or facilitate in perpetrating the harassment. *Id.* at 1446.

The Third Circuit also combines a negligence standard with other agency principles, recognizing three potential bases under § 219 of the RESTATEMENT for imposing liability on employers: (1) for torts committed by employees within the scope of their employment; (2) for the employer's own negligence in failing to take action upon notice of harassment; and (3) where the harassing employee relied upon apparent authority or was aided by the existence of the agency relationship. *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 106-08 (3d Cir. 1996). According to the Third Circuit, scope-of-employment liability does not apply in the hostile environment context because, unlike the quid pro quo case, "the harasser is not explicitly raising the mantle of authority to cloak the plaintiff in an unwelcome atmosphere." *Id.* at 106-07. Supervisors can be "aided" by the existence

of the agency relationship by having power or "apparent authority" over the victim. In this regard, however, the Third Circuit in *Bouton* included a significant caveat: the harassed employee must have a reasonable belief that the supervisor is authorized in his actions before the employer is bound, and such a belief is unreasonable if the employer has a remedial sexual harassment policy that is known to the employee. *See id.* at 108-110.

The D.C. Circuit's liability standard adopts a narrow view of the principles in § 219(2), and similarly incorporates a "reasonableness" requirement. In *Gary v. Long*, 59 F.3d 1391 (D.C. Cir.), *cert. denied*, —— U.S. ——, 116 S.Ct. 569 (1995), the Court stated that

> an employer may not be held liable for a supervisor's hostile work environment harassment if it is able to establish that it had adopted policies and implemented measures such that the victimized employee either knew or should have known that the employer did not tolerate such conduct . . . While a supervisor might purport to act or speak on behalf of the employer, there can be no liability if the victim could not reasonably rely on the supervisor's representations.

Id. at 1398.

The Sixth Circuit, unlike the Fourth, Seventh and Eighth Circuits, applies the negligence (*i.e.*, knew-or-should-have-known) standard only in cases of co-worker hostile environment harassment. In determining whether an employer should be held liable for hostile environment harassment by a supervisor, the Sixth Circuit considers (1) whether the supervisor's harassing actions were foreseeable or fell within the scope of his employment, and (2) even if they were, whether the employer responded adequately and effectively to negate liability. *Kauffman v. Allied Signal, Inc., Autolite Division*, 970 F.3d 178, 183 (6th Cir.), *cert. denied*, 506 U.S. 1041 (1992). In determining whether the acts complained of occurred

within the scope of the agent's employment, the Sixth Circuit has stated that courts must examine such factors as when and where the act took place, and whether it was foreseeable. *Id. But see Andrade*, 88 F.3d at 261 ("Our precedent rests on the presumption that illegal sexual activity is an illegitimate corporate activity, beyond the scope of supervisors' employment."); *Harrison*, 112 F.3d at 1444 (scope-of-employment liability rarely applicable in hostile environment context because sexual harassment is simply not within the job description of any supervisor or any other worker in any reputable business.

The Second Circuit not only distinguishes between co-worker harassment and supervisor harassment, but between harassment by high-level supervisors and harassment by low-level supervisors. Citing § 219 of the RESTATEMENT, the Second Circuit has held that an employer will be liable for hostile environment harassment by a supervisor when the supervisor uses his actual or apparent authority to further the harassment, or is aided in accomplishing the harassment by the existence of the agency relationship. If the supervisor in question is sufficiently high in the employer's hierarchy, his actions will necessarily be imputed to the employer. If the harassment is by a low-level supervisor who does not rely on his supervisory authority to carry out the harassment, a negligence standard applies, *i.e.*, the employer will not be liable unless it provided no reasonable avenue for complaint or knew of the harassment and did nothing about it. *Karibian v. Columbia University*, 14 F.3d 773, 780 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994).

These various formulations cast more doubt than light on the issue, and raise as many questions as they answer. The agency principles as incorporated by a number of courts result in rules that are murky at best. When is hostile environment harassment really "accomplished" by an "instrumentality of agency"? What distinctions should

be made for liability purposes depending solely on whether the harasser is a co-worker, a low-level supervisor or a high-level supervisor? Should liability depend upon whether the harassed employee could reasonably have believed the harassing supervisor was exercising apparent authority? Is the "essential question" for agency purposes whether the supervisor was "acting within the scope of his employment," as the Sixth Circuit had suggested? Or is the proper analysis, as the Ninth Circuit indicates, not "scope of employment," but whether management knew or should have known of the harassment? Is a supervisor ever acting within the scope of his employment when he illegally harasses an employee? Is the knew-or-should-have-known standard inapplicable when the harasser is a supervisor, as the Sixth Circuit has indicated? Or is it the essential inquiry, as the Fourth, Seventh, Eighth and Ninth Circuits have indicated?

This Court should grant Domino's Petition to resolve these and other questions presented by the inconsistent case law, and bring order and clarity to the law on this important issue.

B. The Circuit Courts Have Obscured the Distinction Between Quid Pro Quo and Hostile Environment Harassment.

As noted above, several circuits—including the Eleventh Circuit—have adopted liability standards that impose liability on employers when supervisors use actual or apparent authority to aid in accomplishing hostile environment harassment. In the present case, for example, the District Court imposed liability on Domino's for Carrier's hostile environment harassment based on the proposition that a supervisor acts as the employer's "agent" when the supervisor exercises authority actually delegated to him to make or threaten to make decisions affecting his subordinates' employment status. App. B at 10a. Under the liability standard as it evolved in *Faragher*, an employer will be held "indirectly" liable if a supervisor is "aided in

accomplishing [hostile environment] harassment by the existence of the agency relationship." 111 F.3d at 1536. *See also Harrison,* 112 F.3d at 1446; *Karibian,* 14 F.3d at 780.

These standards tend, however, to obscure any meaningful distinction between hostile environment harassment and quid pro quo harassment. As a practical matter, it is, of course, the role and function of supervisors to exercise the authority delegated to them to manage subordinates. This often includes making decisions that affect subordinates' employment status in some way. Thus, it may be the case that a supervisor has engaged in hostile environment harassment toward a particular employee, and that same supervisor has also, in the course of properly carrying out his duties and responsibilities, been called upon to make decisions that adversely affect the harassed employee. That does not mean the two actions are necessarily connected; the employment decision may in no way be conditioned on or related to the harassment.

Supervisory status becomes relevant for liability purposes when there is a link between the supervisor's use of his delegated authority and the extortion of sexual favors. As the Second Circuit pointed out in *Torres*—and as the Eleventh Circuit acknowledged in *Faragher*—supervisors are, in a sense, always aided in accomplishing harassment by the existence of the agency because their responsibilities provide proximity to and contact with the harassed employee:

> But that proves too much, and would allow the exception to swallow the rule. . . . It is likewise the case that the supervisor is always aided by the employment relationship because the employee will fear the repercussions that might result from her complaining or resisting. But this exception too, if applied in the absence of specific evidence that the supervisor used his authority to place the employee in a position in which she felt she could not complain without facing adverse consequences, would

> swallow the rule . . . . Thus, in order to establish liability on the theory that the supervisor exploited the agency relationship in committing the harassment, a plaintiff "must allege facts which establish a nexus between the supervisory authority" and the harassment.

Torres, 116 F.3d at 635 (quoting *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1306 (2d Cir. 1995)).

The existence of this type of nexus, however, is the essence of quid pro quo harassment, not hostile environment harassment. When a supervisor uses his position explicitly or implicitly to condition the receipt of job benefits or threaten a job detriment based on the subordinate's response to requests for sexual favors, such improper wielding of the authority delegated to him is the gravamen of a quid pro quo claim. *See Karibian*, 14 F.3d at 777; *Harrison*, 112 F.3d at 1443. *See also Nichols*, 42 F.3d at 509 (the essence of the quid pro quo theory of harassment is that a supervisor relies upon his actual or apparent authority to extort sexual consideration from an employee) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982)).

This Court distinguished quid pro quo and hostile environment harassment as separate and distinct forms of discrimination in *Meritor*, with the implication, certainly, that they should be treated differently. Since *Meritor*, courts have generally held employers strictly liable for quid pro quo harassment. *See, e.g., Davis*, 115 F.3d at 1367; *Harrison*, 112 F.3d at 1443; *Nichols*, 42 F.3d at 513-14; *Bouton*, 29 F.3d at 106-07; *Karibian*, 14 F.3d at 777.[6] As this Court pointed out in *Meritor*, however,

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[6] Some conflict among the circuits exists even on this issue. Several courts have concluded that it takes more than a mere threat to impose quid pro quo liability on an employer. Rather, the plaintiff must show that he or she actually was denied a job benefit or suffered a job detriment as a result of failing to submit to sexual advances. *See, e.g,. Gary v. Long*, 59 F.3d at 1396 ("it takes more than saber rattling alone to impose quid pro quo liability on an

employers are not always liable for hostile environment harassment by supervisors. 477 U.S. at 72.

Yet, by incorporating such broad views of agency principles into their liability standards for hostile environment harassment by supervisors, the Eleventh Circuit and several other circuits have so expanded the definition of this form of harassment that they have effectively conflated the two theories and have eliminated any meaningful distinction between hostile environment harassment and quid pro quo harassment. The result is essentially a uniform mode of analyzing all harassment claims involving a supervisor, utilizing a standard that approaches strict liability. Given the harshness of that result, it is important to keep definitions clear and narrow, so that plaintiffs meet the burden of showing that employer liability should, in fact, attach.

This Court should grant Domino's Petition and, in clarifying the proper standard for liability in the hostile environment context, should also clarify the distinctions between supervisor hostile environment harassment and quid pro quo harassment for liability purposes, so courts will have a clear, coherent basis for enforcing the law.

C. The Inappropriate and Overly-Expansive Application of Agency Principles in the Present Case.

The present case illustrates how the conclusory application of generic agency principles in the hostile environment context can result in an inappropriate and overly-expansive analysis of liability for harassment claims. As noted above, in holding Domino's liable for Carrier's

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employer; the supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances). *But see Nichols v. Frank*, 42 F.2d at 513 ("[A] supervisor's intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments in a single conversation constitutes quid pro quo harassment.").

hostile environment harassment of David Papa, the District Court broadly applied general agency principles regarding the exercise of delegated authority to make or threaten to make decisions regarding a subordinate's employment status. But even under the Eleventh Circuit's expansive formulations, conduct warranting imposition of what *Faragher* refers to as "indirect" liability did not occur here.

Carrier's alleged harassment of Papa was not "accomplished by an instrumentality of the agency or through conduct associated with agency status." *Faragher,* 111 F.3d at 1537. As set forth above, the District Court credited testimony that Carrier had engaged in instances of inappropriate touching, made several sexually-related comments, and also expressed her caring and love for Papa. App. B at 4a-5a. *These were all modes of harassment easily available to a non-supervisory employee.* The trial court did not find that Carrier made any sexual demands, let alone that the conduct in question was accompanied by statements or suggestions that, if Papa did not submit to her overtures, a job detriment would occur.

Rather, the District Court's decision to impose liability on Domino's for hostile environment harassment essentially rested on one occasion when Carrier expressed her affection for Papa, following which Papa ordered her out of his office and threatened to report her conduct to her supervisor. Upon leaving the store that day, Carrier reportedly made a statement to the effect that she would "get" Papa. Approximately a week later, Papa was advised by Carrier and Mike Haskins, Carrier's direct supervisor, that he was being terminated for violations of company policy, *i.e.,* for the fraudulent manipulation of store paperwork. *Id.* at 5a. The District Court concluded that Carrier was exercising the authority delegated to her by Domino's when she was involved in Papa's termination, and that Domino's was therefore liable for her hostile environment sexual harassment of Papa. *Id.* at 10a.

As discussed above, *any* actions supervisors take in their supervisory capacity could be deemed an exercise of the authority delegated to them by the employer. But, as *Faragher* warns, that principle should not be so broadly applied. 111 F.3d at 1537. *See also Torres,* 116 F.3d at 635. Carrier did not "accomplish" the harassment in question by using her role as supervisor. The District Court's expansive application of general agency principles to impose liability on Domino's for Carrier's hostile environment harassment is unwarranted even under the standard in *Faragher.*

In formulating a framework for analyzing hostile environment claims by supervisors in *Faragher,* the Eleventh Circuit repeatedly cited to and relied upon *Sparks v. Pilot Freight Carriers, Inc.,* 830 F.2d 1554 (11th Cir. 1987), a case involving allegations of both hostile environment harassment and quid pro quo harassment. *Faragher,* 111 F.3d at 1536-37. Among other things, *Sparks* is cited to describe an example of a supervisor engaging in hostile environment harassment by using "the authority delegated to him to assist in the harassment: He repeatedly reminded the victim that he could fire her if she refused his advances." *Id.* at 1537 (citing *Sparks,* 830 F.2d at 1560).

This is notable for two reasons. First, such linking of sexual favors and a threatened job detriment describes quid pro quo harassment, underscoring the Eleventh Circuit's move toward conflating the two theories. *Cf. Henson v. City of Dundee,* 682 F.2d 897, 910 (11th Cir. 1982) (in a quid pro quo case, "the supervisor relies upon his apparent or actual authority to extort sexual consideration from an employee. Therein lies the quid pro quo."). Second, there was no finding that Carrier made any threats, conditions or demands to elicit sexual favors from Papa in the present case. Carrier never gave Papa an ultimatum—or even a strong suggestion—that he had better comply with her sexual demands or a job detriment would result. Thus, the record in the present case not only

fails to provide any reasonable basis for imputing liability to Domino's for Carrier's hostile environment harassment, it also fails to support a finding of quid pro quo harassment. *Cf. Farley v. American Cast Iron Pipe Company*, 115 F.3d 1548, 1552-1553 (11th Cir. 1997) (reciting *Faragher* standard, analyzing hostile environment claim only in terms of whether employer knew or should have known of the harassment, and finding no quid pro quo harassment because evidence did not show supervisor conditioned or demanded acquiescence to his sexual overtures in exchange for tangible job benefit).

The District Court's decision in the present case illustrates the confused state of the law on issues courts are confronting with increasing frequency: Can the requisite nexus be established in circumstances where the trier of fact makes no finding that the supervisor made explicit sexual requests or demands, and any implicit suggestions or requests were not associated with the plaintiff's job? Is quid pro quo harassment established where, as here, the only possible link was an equivocal remark Carrier supposedly made after being ordered from Papa's office, coupled with the fact that Papa was subsequently terminated? And if these facts are sufficient to establish a prima facie case of quid pro quo harassment, what is the distinction between this analysis and imposing liability on employers in hostile environment cases, where the "harassment is accomplished by an instrumentality of the agency or through conduct associated with agency status"? *Faragher*, 111 F.3d at 1537. For that matter, what meaningful distinction exists between the District Court's expansive interpretation that quid pro quo harassment was established because the plaintiff was subsequently terminated, and claims of retaliatory discharge? [7]

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[7] The District Court's analysis of the retaliation claim was similarly flawed for two reasons. First, although the District Court concluded that Carrier's motivation for *reporting* the paperwork manipulation was improper—and even that she was involved in the

Most important, the practical effect of the District Court's expansive analysis is that, in virtually every situation where there is a finding of any conduct amounting to sexual harassment by a supervisor and where subsequent adverse action is taken against the employee claiming harassment, even when the employer has no actual or constructive knowledge of the harassment, the plaintiff will be found to have established a prima facie case against the employer under all three separate and independent theories: quid pro quo harassment, hostile environment harassment and retaliation. The District Court's application of the facts to the law in the present case essentially conflates these distinct theories, and demonstrates the need for clarification of the relationship—and analytical distinctions—among them. This case presents an opportunity for the Court to provide much-needed clarification on issues of substantial importance in a growing area of the law.

II. TITLE VII SHOULD NOT BE INTERPRETED TO PERMIT A DISTRICT COURT TO ORDER SWEEPING INJUNCTIVE RELIEF AGAINST AN EMPLOYER WHERE THE EMPLOYER HAD NEITHER ACTUAL NOR CONSTRUCTIVE KNOWLEDGE OF ITS EMPLOYEE'S IMPROPER CONDUCT.

The District Court expressly found that "Domino's had neither actual nor constructive knowledge of the hostile atmosphere created by Carrier." App. B at 10a. There were no allegations or findings of a pattern or practice of

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manipulation—it is undisputed that improprieties *did* occur in paperwork for which Papa admitted he was ultimately responsible. This may mean that Carrier should also have been discharged, but it does not establish that Papa was fired for an improper reason. Second, the District Court's conclusion that Papa's "termination by Carrier" (App. B at 12a) was retaliatory completely overlooks the role of Carrier's supervisor, Mike Haskins, in the termination. App. B at 5a. Surely the actions of Haskins must be considered to be the actions of Domino's to an even greater extent than Carrier's, and there has been no suggestion that Haskins had any retaliatory motive. This issue should also be reconsidered on remand.

discrimination or retaliation. Rather, the trial court found one isolated instance of sexual harassment by one low-level supervisor directed against one employee at one of Domino's approximately seven hundred locations.

Yet, the District Court granted sweeping injunctive relief against Domino's, permanently enjoining the Company "from engaging in any employment practice which discriminates against employees by subjecting them to sexual harassment and or [sic] which discriminates against employees who oppose what the employee believes to be a discriminatory employment decision." App. B at 16a-17a. The Court also required Domino's "to post a written sexual harassment and retaliation policy in each of its stores for a period of at least two years from the date of this judgment," and "to conduct yearly training of each of its managers, including store managers, regarding [Domino's] sexual harassment and retaliation policy for a period of two years from the date of this judgment." *Id.* This sweeping relief is neither appropriate nor warranted in the context of this case.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(e)-5(g), permits courts to "order such affirmative action as may be appropriate" if a party "is intentionally engaging in an unlawful employment practice. . . ." This Court has not addressed the propriety of imposing a far-reaching injunction under this statute where, as here, the District Court has made no finding of company-wide discrimination meriting broad-based remediation. In addition, uncertainty about the permissible scope of injunctive relief exists in the lower federal courts, with courts outside the Eleventh Circuit expressing reluctance to impose sweeping injunctions in similar circumstances. *See, e.g., Spencer v. General Elec. Co.*, 894 F.2d 651, 660 (4th Cir. 1990) (affirming the denial of an injunction in a sexual harassment case, noting there was no systematic company-wide discrimination but rather an isolated incident involving one supervisor); *Kirkland v. Buffalo Board*

of Ed., 487 F. Supp. 760, 773 (W.D.N.Y. 1979) (plaintiff not entitled to an injunction placing him in position and enjoining defendant from continuing allegedly discriminatory practices because there was no proof or finding of a pattern or practice of discrimination; case was based on "an isolated violation of Title VII, § 2000e-3(a) which does not portend a recurrence."), *aff'd*, 622 F.2d 1066 (2nd Cir. 1980) (affirmed for reasons given by District Court).

The District Court's interpretation of the breadth of its equity power under Title VII is inconsistent with both the language of the statute and the general equity jurisprudence of this Court. In *Rizzo v. Goode*, 423 U.S. 362 (1976), a 42 U.S.C. § 1983 case, this Court held in part that, where responsible authorities did not play a part in unconstitutional deprivations by a few individual police officers, injunctive relief was improper. As this Court explained:

> The scope of federal equity power, it is proposed, should be extended to the fashioning of prophylactic procedures for a state agency designed to minimize . . . misconduct on the part of a handful of its employees. . . [T]his novel claim [is] quite at odds with the settled rule that in federal equity cases "the nature of the violation determines the scope of the remedy. . . ."

423 U.S. at 378 (quoting *Swann v. Charlotte-Mecklenberg Board of Ed.*, 402 U.S. 1, 16 (1971)).

As the First Circuit noted in *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1990), "[a]n injunction should be narrowly tailored to give only the relief to which plaintiff[] [is] entitled." *Id.* at 361. In *Brown*, the First Circuit vacated as overbroad an order enjoining defendant from discriminating against other putative members of plaintiff's class. "[Plaintiff's] case established that she alone had been the victim of sex discrimination. The only permissible focus of the injunc-

tive relief, therefore, would be on protecting her from further instances of sex discrimination." *Id.* In the present case, there was no finding or evidence showing that broad injunctive relief was "appropriate," or that it was necessary to prevent future violations of Title VII. *See United States v. Oregon Medical Society*, 343 U.S. 326, 333 (1952) (injunctive relief should not be considered unless the record shows "a real threat of [a] future violation [of the law] or a contemporary violation of a nature likely to continue or recur").

Despite the dearth of evidence in this case of a pattern of discrimination or retaliation, and the District Court's express finding that Domino's was unaware of this one isolated instance of wrongdoing by a low-level supervisor, the Court imposed a sweeping injunctive remedy that will impact roughly seven hundred Domino's stores across the nation. The scope of this remedy is dramatically disproportionate to the events giving rise to it.

In deciding whether injunctive relief is appropriate, "a district court must, of course, exercise its discretion in light of the prophylactic purposes of the [Civil Rights] Act . . . ." *Spencer*, 894 F.2d at 600. Here, however, no finding by the District Court supports the conclusion that injunctive relief will serve any such prophylactic purpose, or that prophylactic measures are even required.

The overbreadth of the injunction imposed on Domino's is perhaps best illustrated by its first provision: permanently enjoining Domino's "from engaging in any employment practice which discriminates against employees by subjecting them to sexual harassment and or [sic] which discriminates against employees who oppose what the employee believes to be a discriminatory employment decision." This sweeping mandate does little more than restate basic principles of federal discrimination law. Furthermore, it is wholly undeserved where, as here, the District

Court acknowledged that Domino's was completely unaware of the situation between Carrier and Papa.

The remainder of the injunction is similarly unwarranted. The trial court at once absolved Domino's from having any knowledge—actual or constructive—about the Carrier/Papa situation, while, at the same time, it punished Domino's by imposing an injunction requiring Domino's "to post a written sexual harassment and retaliation policy in each of its stores for a period of at least two years from the date of this judgment," and "to conduct yearly training of each of its managers, including store managers, regarding [Domino's] sexual harassment and retaliation policy for a period of two years from the date of this judgment." App. B at 16a-17a. The scope of this remedy far outstrips the isolated Title VII violation giving rise to it. *See Rizzo*, 423 U.S. at 378.

The injunction imposed here is also inappropriate in light of the nearly seven-year time gap between the allegedly improper conduct and the District Court's judgment. This suit was brought as the result of a discrete series of events occurring between January and May of 1988. The District Court's opinion was issued more than seven years later, on November 17, 1995.

Courts outside the Eleventh Circuit have held that, where a significant amount of time has lapsed between the illegal activity and imposition of an injunction, equitable relief is inappropriate. *See, e.g., Webb v. Missouri Pac. R.R. Co.*, 98 F.3d 1067, 1069 (8th Cir. 1996) (even findings of widespread discrimination do not support an injunction issued five years after the close of all the evidence); *Boykin v. Georgia-Pacific Corp.*, 706 F.2d 1384, 1394 (5th Cir. 1983) (holding injunction inappropriate where last testimony about class-wide discriminatory treatment was seven years old). The relief affirmed by the Eleventh Circuit here is even more inappropriate since the allegedly improper activity was a brief series of incidents that took place nearly a decade ago involving two individuals who are no longer employed by Domino's.

Because of the untimeliness and overbreadth of the injunctive relief ordered by the District Court and affirmed by the Eleventh Circuit in this case, Domino's respectfully requests that this Court grant its Petition for a Writ of Certiorari to consider the permissible scope of injunctive relief under Title VII.

III. THE QUESTIONS PRESENTED ARE PROPERLY BEFORE THIS COURT.

In the District Court and in the Eleventh Circuit, Domino's generally denied any liability under Title VII. This Court should not, however, limit Domino's to these specific arguments, and should allow Domino's to raise the questions presented in this Petition. This Court has said that "[o]ur traditional rule is that "once a federal claim is properly presented, a party can make any argument in support of the claim; parties are not limited to the precise arguments they made below." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (petitioner had not raised point below and had even expressly disavowed it in both lower federal courts; this Court characterized point as "a new argument to support what has been his consistent claim.").

In addition, the questions presented here were also raised in Domino's Suggestion of Rehearing En Banc in the Eleventh Circuit. *Banker's Life and Casualty Company v. Crenshaw*, 486 U.S. 71, 77 (1988) (Court declined to address issues not raised and passed on in state court, but noted that result might have been different if party had raised issue on rehearing below).

Moreover, this Court should allow Domino's to raise any issue that the District Court and Court of Appeals "passed upon." *Lebron*, 513 U.S. at 379. *See also Virginia Bankshares Inc. v. Sandberg*, 501 U.S. 1083, 1099, n.8 (1991) (If court below passed on issue presented, particularly where issue is in a state of evolving definition and uncertainty and is one of importance to the admin-

istration of federal law, the Court will consider an issue not raised below).

In any event, even if this Court finds that the questions Domino's has presented were not otherwise preserved, it may still consider them. The decision to review issues presented for the first time is a prudential determination in the context of cases arising from federal courts. *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992) (citing *Carlson v. Green*, 446 U.S. 14, 17, n.2 (1980)). Here, Domino's decision to raise issues in its Suggestion of Rehearing En Banc in the Eleventh Circuit and in this Petition for a Writ of Certiorari that were not raised in its initial brief on appeal was based in large part upon intervening decisions such as *Faragher*, which brought to light the evolving nature of the law on issues that Domino's had not anticipated or previously considered. Because the questions presented by Domino's are important and timely, and are based on evolving principles of law, this Court should exercise its discretion to grant Domino's Petition.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the case set for full briefing and argument. In the alternative, the Petition should be granted, the judgment vacated, and the case remanded to the United States Court of Appeals for the Eleventh Circuit for reconsideration in light of *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997) (en banc), *petition for cert. filed*, No. 97-282 (August 13, 1997).[8]

Respectfully submitted,

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[8] *Stutson v. United States*, —— U.S. ——, 116 S.Ct. 600 (1996), and *Lawrence v. Chater*, —— U.S. ——, 116 S.Ct. 604 (1996), provide this Court with ample authority to enter a "GVR" order in this case.